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No. 06-1601

IN THE

# Supreme Court of the United States

CHARLES J. HYNES, individually and in his capacity as District Attorney for the County of Kings, New York,

*Petitioner*,

*v.*

ROBERT CHARLES REULAND,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF IN OPPOSITION

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## RESPONDENT'S STATEMENT OF QUESTION PRESENTED

Is there a compelling reason to grant Hynes's Petition for Certiorari where the United States Court of Appeals for the Second Circuit correctly determined, based on settled law, that 1) a hyperbolic statement regarding crime rates, published outside the workplace, touches on a matter of public concern irrespective of the speaker's motive for making the statement, 2) there was no evidence of potential disruption of the workplace as a result of that statement, 3) the issue of potential disruption of the workplace was never submitted to the jury and was therefore waived by Petitioner, 4) the statement is therefore protected by the First Amendment, and 5) where that determination does not conflict, directly or otherwise, with the decisions of this Court or with the decisions of other Circuit Courts of Appeals?

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## THERE IS NO COMPELLING REASON TO GRANT THE PETITION FOR CERTIORARI

### A. Relying On *Connick v. Myers*, 461 U.S. 138 (1983) And *Pickering v. Board Of Education*, 391 U.S. 563 (1968), The Second Circuit Correctly Concluded That The Motive Of The Speaker Is Not Dispositive On The Issue Of Whether Speech Touches On A Matter Of Public Concern; That Ruling Does Not Conflict With Prior Rulings Of This Court Or With Rulings Of The Other Circuit Courts Of Appeals

While Hynes has framed the "question presented" on this Petition as whether the Second Circuit's ruling in this case directly conflicts with the rulings of this Court or the Courts of Appeals of the other Circuits, the body of the Petition makes reference not to an actual split among the Circuits, or among the Circuits and this Court, but to a "**potential split**"[1] among the Circuits on the issue of whether a speaker's motive is dispositive in determining whether speech is on a matter of public concern. See Petition for Certiorari, p. 12, 14.

However, as noted by the Court of Appeals for the Second Circuit in its decision in this case, only one Circuit Court "has **potentially** treated motive as dispositive, but has not explicitly so held." See Petition for Certiorari, Appendix A, p. 17a,[2] *citing Schalk v. Gallemore* 906 F.2d 491 (10th

[1] Arguably, there could always be a "potential split" or "potential conflict" among the Circuits at any subsequent point in time.

[2] It is respectfully suggested that *Schalk v. Gallemore, supra.*, should not be read as even potentially treating motive as dispositive.

Cir, 1990). On the contrary, in *Schalk*, the Tenth Circuit determined that the employee's speech was protected under the First Amendment but granted the Defendant qualified immunity.

All of the Circuit Courts of Appeals which have **actually** resolved this issue have concluded, as has the Second Circuit,[3] that the speaker's motive is not dispositive as to whether an employee's speech relates to a matter of public concern. *Tripp v. Cole*, 425 F.3d 5, 11 (1st Cir. 2005) ("Where a public employee speaks out on a topic which is clearly a legitimate matter of inherent concern to the electorate, the court may eschew further inquiry into the employee's motives . . . ."); *Markos v. City of Atlanta*, 364 F.3d 567 (5th Cir. 2004) (noting that although motivation is often relevant, it is not "the new litmus test for the matter of public concern analysis, displacing the *Connick* factors"); *Anderer v. Jones*, 385 F.3d 1042 (7th Cir. 2004) ("We acknowledge that motive is relevant to the matter of public concern inquiry, though it is not dispositive."); *Alpha Energy Savers, Inc. v. Hansen,* 381 F.3d 917, 925 (9th Cir. 2004); ("[W]e have held that motive should not be used as a litmus test for public concern; rather, content is the greatest single factor in the *Connick* inquiry."); *Azzaro v. County of Allegheny*, 110 F.3d 968, 978 (3rd Cir. 1997) ("*Connick* indicates that the speaker's motive, while often a relevant part of the context of the speech, is not dispositive in determining whether a particular statement relates to a matter of public concern."); *Chappel v. Montgomery County Fire Prot. Dist. No. 1*, 131 F.3d 564, 576 (6th Cir. 1997) ("The motive which underlies an employee's statements is a

[3] The Second Circuit noted that its previous cases suggesting that the speaker's motive might indicate that speech did not touch on a matter of public concern focused primarily on private motives related to workplace grievances. Petition for Certiorari, p. 14a

relevant, but not necessarily dispositive factor in considering whether an employee's statements may be fairly characterized as relating to any matter of political, social, or other concern to the community."); *Morris v. Crow*, 117 F.3d 449, 457 (11th Cir. 1997) ("An employee's motive for speech, while not dispositive, is a factor that must be considered in determining whether speech is a matter of public concern."); *Barnard v. Jackson County*, 43 F.3d 1218, 1226 (8th Cir. 1995); ("Insofar as self-interest is found to have motivated public-employee speech, the employee's expression is entitled to less weight in the *Pickering* balance than speech on matter of public concern intended to serve the public interest").

Thus, because the decision of the Second Circuit Court of Appeals in this case does not conflict with the decisions of other Circuit Courts of Appeals or with the decisions of this Court, there is no compelling reason to grant Hynes's Petition for Certiorari.

**B. This Case Presents Neither A Novel Issue Nor One That Is Of Vital Governmental Importance: The Law is Well-Settled that Hyperbole, As Well As False Statements, Are Protected By The First Amendment; Further, Hynes Himself (As Opposed To His Attorneys On Appeal) Never Advanced The So-Called Falsity Of Reuland's Statement To *New York Magazine* As A Reason For Demoting Him**

Contrary to Petitioner's assertion, this case presents neither a novel issue nor one that is of "vital governmental importance."

Reuland's statement, as published in *New York Magazine*, was "Brooklyn is the best place to be a homicide

prosecutor" because "we've got more dead bodies per square inch than anyplace else." Petition for Certiorari, p. 4a.

Hynes's attempt on appeal to spin Reuland's statement into a "recklessly false statement," which, according to him, denudes the statement of First Amendment protection, should be rejected by this Court as it was by the United States Court of Appeals for the Second Circuit.

First, in its decision, the Court of Appeals for the Second Circuit accurately noted that there was no proof in the record that Reuland's statement was in fact false or that Reuland made the statement with knowledge of or reckless disregard for, its falsity. Petition of Certiorari, p. 9a-10a.

The Court went on to note that in any event, all parties conceded that the statement in question was hyperbole. See Petition for Certiorari, p. 9a.

In fact, the record demonstrates that prior to his appeal to the Second Circuit, Hynes never advanced the falsity, or lack of literal accuracy of, Reuland's statement to *New York Magazine*, as a reason for Reuland's demotion. It is thus not surprising that the District Court's decision on the parties' Rule 50 motions makes absolutely no reference to this issue. See Petition for Certiorari, pp. 37a-58a.

Rather, Hynes's claim, though rejected by the jury, was that he demoted Reuland in 2001 because he believed that Reuland had lied to him a year earlier regarding his motivations for wanting to be promoted to the Homicide Bureau.

When, for the first time at oral argument on appeal, Hynes's counsel advanced the contention that Reuland's statement did not touch on a matter of public concern because it was not true, the Court specifically requested that the parties submit Rule 28(j) letter briefs on this issue and as to whether the issues had been raised. Petition for Certiorari, p. 8a.

To the extent that this contention was considered by the Second Circuit, that Court relied on settled Supreme Court case law in holding that false speech, as well as hyperbole which could not reasonably be perceived as fact, is entitled to First Amendment protection. *N.Y. Times v. Sullivan,* 376 U.S. 254, 271 (1964), ("[E]rroneous statement is inevitable in free debate and . . . it must be protected if the freedoms of expression are to have the breathing space they need to survive."); *Hustler Magazine v. Falwell,* 485 U.S. 46 (1988) (parody that was not reasonably believable was protected by the First Amendment"); *Pickering v. Board of Education of Township High School Dist.*, 391 U.S. 563, 570-573 (1968).

Additional cases decided by this Court are in accord. *Buckley v. Valeo*, 424 U.S. 1(1976); *Rankin v. McPherson*, 483 U.S. 378 (1987). The First Amendment also protects statements which could not reasonably have been interpreted as stating actual facts [about the public figure involved], and merely rhetorical hyperbole. *Miklovich v. Lorain Journal Co.*, 497 U.S. 1 (1990).

Cases decided by the Second Circuit and other Circuits Courts of Appeals (as well as District Courts) have followed the lead of this Court. "Constitutional protection does not turn upon the 'truth, popularity, or social utility of the ideas and beliefs which are offered,' for 'erroneous statement is

inevitable in free debate and . . . must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'" *X-Men Security, Inc. v. Pataki*, 196 F.3d 56, 69 (2nd Cir. 1999), *citing New York Times Co. v. Sullivan*, 376 U.S. 254, 271-72 (1964) (*quoting N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963).

"A speaker is not required to prove the truth of an allegation for it to constitute a matter of public concern." *Skeehan v. Kelly*, 2005 WL 1023206, *12 (S.D.N.Y. 2005), *citing Farhat v. Jopke*, 370 F.3d 580, 591, n. 8 (6th Cir. 2004) (a public employee who "engage[s] in speech alleging public corruption [does not] have to prove the truthfulness *of that speech* in order to show it touches upon a public concern.") (emphasis in original); *Gazarkiewicz v. Town of Kingsford Heights*, 359 F.3d 933, 942 (7th Cir. 2004); *Buschi v. Kirven*, 775 F.2d 1240, 1248 (4th Cir. 1985) (relevant question is whether a comment, irrespective of its truth or falsity, touches on a matter of public concern); *Munafo v. Metro. Trans. Auth.*, 2003 U.S. Dist. LEXIS 13495, *36 (E.D.N.Y. 2003 (Korman, C.J.) ("[plaintiff] does not need to prove his complaints were accurate in order to sustain his claim for wrongful termination; retaliation in response to his speech is prohibited by the First Amendment regardless of its truth.").[4] *See also Salge v. Edna Independent School District*, 411 F.3d 178, 185 (5th Cir. 2005) ("whether an employee's speech is true

[4] The Sixth Circuit in *Farhat* cited to several previous Sixth Circuit decisions which similarly held truthfulness is not required to be proven in order for the statement at issue to be protected by the First Amendment. *See Farhat*, 370 F.3d at 591, n. 8, citing *Rodgers v. Banks*, 344 F.3d 587, 601, n.5 (6th Cir. 2003); *Chappel v. Montgomery Cty. Fire Prot., Dist. No. 1*, 131 F.3d 564, 576-577 (6th Cir. 1997) and *Williams v. Kentucky*, 24 F.3d 1526, 1535-1536 (6th Cir.), *cert. denied sub nom Allen v. Williams*, 513 U.S. 947 (1994).

or false plays no role in the determination whether the speech concerned a matter of public interest."), *citing Denton v. Morgan*, 136 F.3d 1038, 1043 (5th Cir. 1998).

Thus, settled precedent holds that the issue of whether Reuland's statement to *New York Magazine* was false or true is entirely irrelevant to the inquiry of whether that statement is protected by the First Amendment.

Finally, the cases cited by Hynes in support of the argument that Reuland's statement was not protected by the First Amendment lend absolutely no support to his position because they are completely inapposite. Those cases, involving "false speech" in the context of defamation of an individual, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974), the application of the *Pickering* balance in holding that university's interest as an employer in disciplining an employee who presented fraudulent data outweighed her right to speak, albeit the speech touched on a matter of public concern, *Pugel v. Board of Trustees of the University of Illinois*, 378 F.3d 659 (7th Cir. 2004) and granting qualified immunity to an employer where the record demonstrated that the employer's adverse employment action was motivated **at least in part** by lawful considerations, *Stanley v. City of Dalton, Georgia*, 219 F.3d 1280 (11th Cir. 2000), have no application here.

**C. Hynes Presented No Evidence Of Disruption Or Potential Disruption Of The Workplace As A Result Of Reuland's Statement To *New York Magazine*; In Fact At Deposition, Hynes's Two Top Assistants Denied Any Such Disruption And Denied That Hynes Ever Expressed Concern About The Potential For Such Disruption; Hynes Explicitly Waived The Issue Of The *Pickering* Balance At Trial And Should Not Be Permitted To Attempt To Inject That Argument By Indirection Here**

Hynes does not directly argue that the *Pickering* balance should have tipped the scales in his favor in this instance; he cannot candidly do so since there was no evidence of any workplace disruption presented at trial which would permit that argument and in fact he explicitly waived this issue at trial. However, he makes two statements suggestive of office disruption in the Petition which require response here.

First, Hynes cites *Garcetti v. Ceballos*, __ U.S. __ 126 S.Ct. 1951 (2006), arguing that "employers have a heightened interest in controlling speech made by an employee in his or her professional capacity because supervisors need to ensure that their employees official communications are accurate, demonstrate sound judgment and promote the employer's mission." Petition for Certiorari, p. 20.

However, the record is clear that Reuland did not make his statement to *New York Magazine* in his official capacity. Petition for Certiorari, p. 10a.

Second, Hynes states "Reuland falsely and disingenuously exaggerated the homicide rate in Brooklyn, for purposes of his own self-promotion and to his employer's detriment." Petition for Certiorari, p. 23.

There is absolutely no basis in the record for any claim of "detriment" to Hynes or his office resulting from Reuland's statement.

**D. At The Time Hynes Demoted Reuland, Settled Law Put Hynes On Notice That Reuland's Statement to *New York Magazine* Regarding The Crime Rate In Brooklyn Touched On A Matter Of Public Concern Irrespective Of The Fact That It Was Not Literally True And Irrespective Of His Motive In Making The Statement; Hynes Is Not Entitled To Qualified Immunity**

Finally, Hynes's argument that he is entitled to qualified immunity is utterly meritless and therefore does not constitute a compelling reason to grant the instant Petition. His contention, reiterated in various forms over a number of pages is that he reasonably believed that "such a recklessly false statement, made by a prosecutor seeking to capitalize on his employment in the Homicide Bureau of the District Attorney's Office, in order to promote book sales, was not protected speech." Petition for Certiorari, pp 22-23.

As the Second Circuit wrote in its opinion, Hynes could be entitled to qualified immunity "only if it was objectively reasonable for him to believe that he could demote an assistant district attorney for making a hyperbolic statement about the crime rate" without violating his First Amendment rights. Petition for Certiorari, p. 21a.

First, prior to Hynes's demotion of Reuland in 2001, the United States Court of Appeals for the Second Circuit held that crime rates are inherently a matter of public concern. *See Morris v. Lindau*, 196 F.3d 102, 111 (2nd Cir. 1999), *citing Connick, supra*.

Second, although prior to appeal Hynes himself (as opposed to his counsel) never claimed that he demoted Reuland because his statement to *New York Magazine* was not true, even if that had been his testimony, the law was nevertheless settled at the time of the demotion that even false statements as well as hyperbole are protected by the First Amendment. *Pickering v. Board of Education of Township High School Dist.*, 391 U.S. 563, 570-573 (1968);[5] *see also* cases cited in Section B., *supra*.

Third, at the time of Hynes's demotion of Reuland, as set forth in Section A., *supra*, the law was sufficiently well established to put Hynes on notice that the motive of the speaker was not dispositive on the issue of whether the speech touched on a matter of public concern.[6]

To the extent that Hynes argues that "many of the cases cited by the Second Circuit" holding that the speaker's motive was not dispositive in determining whether speech touched on a matter of public concern, were decided after Reuland's 2001 demotion, at least an equal number of the cases cited by the Second Circuit were decided well before Reuland's

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[5] In a footnote, the Court in *Pickering* noted that it did not go as far as to decide the issue of whether a public employee's knowingly or recklessly making a false statement would still be protected by the First Amendment. *Pickering*, 391 U.S. at 575, n. 6. However, after *Pickering*, the U.S. Supreme Court in *Rankin* applied the principle that erroneous statements are still entitled to the protections of the First Amendment and specifically in the public employment arena.

[6] To the extent that any Courts have focused on the motive of the speaker, the issue has been whether the speech was calculated to redress personal workplace grievances. See for example, *Lewis v. Cowen*, 165 F.3d 154 (2nd Cir. 1999).

demotion. See Section A, *supra* and Petition for Certiorari, pp. 21a-22a.

In addition, none of the Second Circuit cases on this issue which were decided prior to Reuland's demotion, suggested, as Hynes does, that motive alone is dispositive of the public concern issue especially where the motive is not to address an employment grievance. *White Plains Towing v. Patterson*, 991 F.2d 1049 (2nd Cir. 1993); *Blum v. Schlegel*, 18 F.3d 1005 (2nd Cir. 1994); *Lewis v. Cowen*, 165 F.3d 154 (2nd Cir. 1999); Petition for Certiorari, p. 15a.

Moreover, this Court, as well as the United States Court of Appeals for the Second Circuit held long before the facts which give rise to this case, that the fact that the motivation for speech may have been personal financial gain does not remove the speech itself from the purview of First amendment protection. *See United States v. National Treasury Employees Union*, 513 U.S. 454 (1995) ("NTEU"); *Bery v. City of New York*, 97 F.3d 689 (2nd Cir. 1996) ("[i]t is well-settled that a speaker's rights are not lost merely because compensation is received.") Accord, *Chapel v. Montgomery County Fire Dist. No. 1*, 131 F.3d 574 (6th Cir. 1997).

Finally, Hynes did not request that the jury determine whether his demotion of Reuland was motivated by disruption (or even the potential for disruption) of his office rather than retaliation; indeed, there was no basis for that request in the record.

For all of the foregoing reasons, Hynes is not entitled to qualified immunity and there is thus no compelling reason to grant his Petition for Certiorari.

## CONCLUSION

For the reasons set forth herein, Respondent Robert Charles Reuland respectfully asks that this Court deny Hynes's Petition for Certiorari.

Respectfully submitted,

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